Supreme Court, U.S.
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No.

In the Supreme Court of the United States

SEAN STEPHEN AND DARYL STEPHEN,
Petitioners,

v.

POLICE OFFICER JOHN HANLEY,
SHIELD NO. 13199, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

The plaintiffs filed a complaint seeking damages under 42 U.S.C. § 1983 for excessive force. It was alleged in the complaint and undisputed that all defendant police officers were in the plaintiffs' two-bedroom apartment at the time of the alleged assault. The question presented is:

Whether the complaint put defendants on notice that plaintiffs could argue at trial that defendants were liable for their failure-to-intervene to prevent the use of excessive force.

RULE 14.1(b) STATEMENT

The full caption is:

1. Sean Stephen
2. Daryl Stephen,

Plaintiffs-Petitioners

v.

1. Police Officer John Hanley, Shield No. 13199
2. Police Officer Edgar Bourdon, Shield No. 30988
3. Sergeant Juan White
4. Police Officer Michael Iliadis
5. Police Officer Terrence Brill
6. Police Officer Patrick Coleman
7. Police Officer Derek Dunston
8. Police Officer Richard Miller
9. Police Officer Jose Hernandez

Defendants-Respondents.

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PETITION FOR A WRIT OF CERTIORARI

Petitioners, Sean and Daryl Stephen, respectfully petition for a writ of certiorari to review the judgment of the United States Court of Appeals for the Second Circuit in this case.

OPINIONS BELOW

The opinion of the Second Circuit (App., *infra*, 1a–6a) is unreported. The rulings of the District Court (App., *infra*, 7a–30a) also are unreported.

JURISDICTION

The judgment of the Court of Appeals was entered on May 12, 2010. Petitioners invoke the jurisdiction of this Court under 28 U.S.C. § 1254(1).

STATUTORY PROVISION INVOLVED

42 U.S.C. § 1983 states:

Every person who, under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress, except that in any action brought against a judicial officer for an act or omission taken in such officer's judicial capacity, injunctive relief shall not be granted unless a declaratory decree was violated or declaratory relief was unavailable. For the purposes of this section, any Act of Congress applicable exclusively to the District of Columbia shall be considered to be a statute of the District of Columbia.

STATEMENT

This case arises from the use of excessive force against a 14-year-old boy, Petitioner Daryl Stephen, and his father, Petitioner Sean Stephen, by members of a New York City Police Department ("NYPD") Emergency Services Unit ("ESU team") and members of the NYPD Anti-Crime Unit (collectively, "the defendants"), during the execution of a search warrant and subsequent arrest of Sean Stephen.

A. The Facts Giving Rise to the Stephens' Lawsuit

In the pre-dawn hours of July 10, 2002, the defendants, acting pursuant to a search warrant, forcibly raided the home of 73-year-old Emelda Stephen, grandmother of Petitioner Daryl Stephen. A. 701, 758–59.[1] At the time of the raid, Sean and Daryl Stephen were visiting. A. 750–51.

According to Sean and Daryl Stephen ("the Stephens"),[2] the incident occurred in two stages. During the first stage, the ESU team, which consisted of seven officers wearing helmets and body armor and

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[1] "A. __" citations refer to the Joint Appendix filed in the Second Circuit.

[2] Petitioners recognize that the unfavorable jury verdict may indicate that the jury did not credit their version of events. But, as explained below, given that the jury found that excessive force was used by the only defendant that plaintiffs were able to identify conclusively during the initial stage of the raid, the unfavorable verdict could have resulted from the District Court's failure to instruct the jury on the failure-to-intervene theory. When the District Court denied the request for an instruction on that theory, the governing standard was whether the theory "[wa]s supported by evidence of probative value." *Anderson* v. *Branen*, 17 F.3d 552, 557 (2d Cir. 1994).

carrying machine guns, bunker shields, and a battering ram, among other weapons (A. 1249, 1282–83), initiated the raid. Upon entering the apartment, the ESU team immediately encountered the Stephens, who had been asleep in a small bed that they were sharing, less than 10 feet from where the ESU team entered the apartment. A. 758. Although the Stephens were unarmed, were dressed in nothing but their underwear, and posed no threat to the heavily-armed ESU team (*ibid.*), at least one ESU team member (according to the jury) assaulted the Stephens. None of the other members of the team asserted that they did anything to stop the use of excessive force.

According to the plaintiffs' testimony, Sean Stephen was struck repeatedly while still in bed. A. 759. Although he attempted to cover up in the fetal position and shield his son from defendants' blows (A. 760–61), he never resisted arrest, struck, attempted to strike, or initiated any physical contact with the defendants (A. 1003, 1333–34, 1571). Daryl Stephens was pushed by his father out of the bed, and he ran for a hallway leading to his grandmother's bedroom. A. 987. While in the hallway, Daryl was kicked to the ground and stepped on until he lost consciousness. A. 989–97. According to hospital records, Daryl suffered a left ear laceration, a cerebral concussion, a facial contusion, and multiple traumas to his body. A. 57, 66. Daryl also was diagnosed with a debilitating case of chronic post-traumatic stress disorder. A. 1367.

Throughout this initial stage of the incident, the lights remained off, and due to the pre-dawn hour, the apartment was dark. A. 759. As a result, the Stephens were unable to identify which specific offic-

ers initially attacked them, though each of the defendants stipulated to having been present at the scene. A. 760, 262–63. Notwithstanding the officers' acknowledgment that they were present during the incident, the entire ESU team claimed a total lack of recollection of the incident. A. 1225, 1268, 1270, 1485, 1504, 1527, 1529–30.

After Daryl Stephen regained consciousness, he was brought back into the bedroom by Officer Brill in handcuffs and positioned next to his father on the bed that they had shared. A. 995–97. By this time, the lights had been turned on, allowing the Stephens to identify Brill as the individual who brought Daryl back from the hallway, as well as the other officers who used excessive force against them during the remainder of the incident. A. 762–63, 777, 996–97.

B. The Proceedings Below

The Stephens, acting *pro se*, filed a lawsuit in the Eastern District of New York on December 2, 2003, for violations of their Fourth Amendment rights by virtue of defendants' use of excessive force. A. 42–53. The plaintiffs invoked the court's jurisdiction under 28 U.S.C. § 1331. The Stephens later filed three amended complaints. A. 82–96. After the Stephens retained counsel, they filed a fourth amended complaint, the operative complaint in this case, on February 4, 2006. A. 104–11. Approximately one year later, on February 15, 2007, current counsel entered a notice of appearance as *pro bono* counsel for the Stephens. A jury trial was held between June 1, 2009 and June 5, 2009.

Prior to and throughout the trial, the Stephens proposed a jury instruction on the defendant officers' liability for failing to intervene to prevent the use of

excessive force by others. The Stephens first submitted a proposed jury instruction on this topic on April 7, 2009, approximately two months before trial. App., *infra*, at 33a–35a. During a pre-trial conference on May 27, 2009, the District Court requested that the parties submit letter briefs supporting or opposing the proposed instruction. A. 281. Defendants argued that any claims for a duty to intervene were required to have been plead as a separate cause of action from the claim for excessive force. The Stephens maintained that the duty to intervene is inherent in any excessive-force claim under the Fourth Amendment, and, regardless, that defendants had substantial actual notice of the theory. A. 281–84.

On the morning of June 1, 2009, the first day of trial, the District Court rejected the proposed jury instruction. App., *infra*, 7a-17a. Nonetheless, the court informed the Stephens' counsel that they could raise the issue again at the charging conference and argue that evidence presented over the course of the trial supported the proposed instruction. *Id.* at 17a. Despite an extensive trial record showing a duty and opportunity to intervene, the District Court again rejected the proposed instruction on June 5, 2009. *Id.* at 21a–28a. Compounding the prejudice from the lack of an instruction on the duty to intervene, the District Court instructed the jury that, in order to find any particular defendant liable, it had to conclude that that defendant caused injury to the Stephens through the use of excessive force. *Id.* at 29a–30a.

After two days of deliberations, the jury found defendant Brill liable to Daryl Stephen and awarded nominal damages. App., *infra*, at 2a-3a. The jury

found in favor of all remaining officers. The District Court entered judgment on June 15, 2009. A. 1953.

The Stephens timely filed a notice of appeal on July 8, 2009. A. 1954–57. On appeal, the Stephens argued, among other things, that the District Court had erred by refusing an instruction on their duty-to-intervene theory of excessive force. In a summary order entered on May 12, 2010, the Second Circuit affirmed. App., *infra*, 1a–6a. The court found that "plaintiffs' fourth amended complaint . . . did not proceed on this theory," instead alleging that each officer-defendant affirmatively used force against the plaintiffs. *Id.* at 4a. The court also stated that "[p]laintiffs alleged no facts in the pleading to suggest that it was difficult to ascertain each defendant's role in the assaults or that they intended to proceed on a 'duty to intervene' theory of liability." *Ibid.* The Second Circuit characterized the theory as "a new theory of liability" and held that the District Court did not abuse its discretion by declining to give the instruction. *Id.* at 3a.

REASONS FOR GRANTING THE PETITION

Courts across the country are split on the question of whether claims against law enforcement officers pursuant to 42 U.S.C. § 1983 for the failure to prevent the use of excessive force must be pleaded separately from excessive force claims arising under the same statute. In this case, the Court of Appeals for the Second Circuit affirmed the District Court's holding that claims for the failure to prevent excessive force must be pleaded separately from claims for excessive force. In so ruling, the Second Circuit joined the First and Sixth Circuits in requiring plaintiffs claiming excessive force, many of whom are indigent and proceeding *pro se*, to separately and

specifically allege that law enforcement officers should be held liable for the failure to prevent excessive force, even where multiple officers are alleged to have used excessive force in a group setting.

The pleading requirement imposed by the First, Sixth, and now Second Circuits is in tension with decisions by other circuit courts, including the Seventh and Eleventh Circuits. This Court's review is warranted to correct the error below and resolve this important question.

I. The Second Circuit's Pleading Standard Is Unduly Strict and Inconsistent With This Court's Precedents.

Several decisions by this Court over the last three years have stressed the importance of facts in pleading. In *Bell Atlantic Corp.* v. *Twombly*, this Court emphasized that facts, not "labels and conclusions," are the key to evaluating the sufficiency of a pleading. 550 U.S. 544, 555 (2007). One year later, in *Ashcroft* v. *Iqbal*, this Court further emphasized the necessity for specific facts in pleadings and rejected a complaint that relied solely on a "formulaic recitation of the elements" of the claim. 556 U.S. —, 129 S. Ct. 1937, 1951 (2008). Those cases follow a long line of precedent in which this Court has declared that the purpose of notice pleading is "to focus litigation on the merits of a claim" (*Swierkiewicz* v. *Sorema N.A.*, 534 U.S. 506, 514 (2002)) and that pleading should not be "a game of skill" in which counsel's failure to use buzz words is decisive (*Conley* v. *Gibson*, 355 U.S. 41, 48 (1957)). See also *ibid.* ("all pleadings should be construed to do substantial justice").

The ruling here is inconsistent with the repeated holdings of lower courts that failure to intervene is not a distinct cause of action but rather is a form of excessive force. See *Hale* v. *Townley,* 45 F.3d 914, 919 (5th Cir. 1995) (addressing "Bystander Liability" as a subcategory of "Excessive Force"); *Cusamano* v. *Sobek*, 604 F. Supp. 2d 416, 429 n.9 (N.D.N.Y. 2009) ("an officer's failure to intervene during another officer's use of excessive force can itself ***constitute*** excessive force") (quoting *Lorenzo* v. *Moore*, No. 06-2717, 2008 WL 314570, at *4 (D.N.J. Jan. 30, 2008)) (emphasis added); *Oliver* v. *City of Orlando*, 574 F. Supp. 2d 1279, 1284 & n.8 (M.D. Fla. 2008) (finding that an officer whose conduct was "purely passive" can be liable for "using excessive force" under failure-to-intervene theory). As the Seventh Circuit has explained, failure to intervene is one of the "four possibilities [for liability] in a tort case with multiple defendants." *Richman* v. *Sheahan*, 512 F.3d 876, 884–85 (7th Cir. 2008).

Here, even the Third Amended Complaint, filed *pro se*, alleged facts that should have put the defendants on notice that they could be liable for excessive force under a failure-to-intervene theory. As the District Court acknowledged, the Stephens' earlier complaints contained specific allegations that "particular officers were present while another officer allegedly engaged in excessive force against one of the plaintiffs." App., *infra*, at 22a. Moreover, the Fourth (and final) Amended Complaint alleged that Sergeant White supervised the other defendants during the incident. *Id.* at 32a. The Second Circuit further noted that the defendants were on notice of the theory no later than "some eight weeks before trial," when they received the plaintiffs' proposed jury instructions. *Id.* at 4a.

Any claim of prejudice from lack of notice is further belied by the District Court's observation that both sides "explored" the duty to intervene during discovery. App., *infra*, at 23a. Deposition testimony adduced many months before trial brought this theory into focus as well. When asked why he was suing Sergeant White, Petitioner Sean Stephen responded that "Sergeant White was in the household. White was there while they was beating me and he didn't do anything to stop them from doing anything." A. 326. And each of the defendants was asked whether he saw any other officers use excessive force. *Ibid.*

This case thus presents an ideal vehicle to clarify the pleadings required to sustain failure-to-intervene liability under 42 U.S.C. § 1983 and provide the lower courts with guidance in dealing with such claims. In this case, there is no question that the plaintiff pleaded all the ***facts*** that were necessary to support the theory and provided adequate notice to the defendants. First, the complaint specifically identified each defendant officer as being present at the time the alleged use of force occurred (and that fact was undisputed at trial). Second, the complaint was specific as to the type of force used against the plaintiffs, its time, and its location. Third, the complaint specifically explained that the alleged assault occurred at 4:30 A.M., when it was still dark. App., *infra*, 31a.

Despite the pleadings and the actual notice both during discovery and eight weeks before trial, the District Court and Second Circuit held that the plaintiffs had lost the opportunity to argue failure to intervene solely because they did not specifically plead that the defendants failed to intervene to prevent the excessive force used by other officers.

The loss of that theory easily could have altered the outcome of the case. The jury found that Officer Brill used excessive force. As to each of the other defendants in relation to the initial encounter with the Stephens, the jury could consistently have found (1) that there was insufficient evidence that that particular officer ***used*** force, but (2) that there was sufficient evidence that that officer had an opportunity to stop the use of force by Brill or another officer whom plaintiffs were unable to identify. It is worth emphasizing that all of the officers stipulated to having been present in the tiny apartment during the incident and that none asserted that he intervened to stop the use of force. In the absence of an instruction on the duty to intervene, the proximate cause instruction left the jury with little choice but to find in favor of the defendant officers whom plaintiffs could not conclusively identify.

Accordingly, this case squarely presents the question of whether a duty to intervene must be asserted as a distinct claim, or whether defendants are adequately put on notice by a complaint that asserts excessive force by a group of law enforcement officers and alleges facts that support liability on the basis of a failure-to-intervene.

II. Lower Courts Have Come to Divergent Conclusions in Cases Involving Similar Facts.

This Court's review is necessary to provide clarity to the lower courts, which have treated similar cases inconsistently. The First and Sixth Circuits expressly hold as a matter of law that a failure-to-intervene theory of liability must be pled separately. In this case, the Second Circuit likewise rejected Petitioners' argument that failure to intervene was en-

compassed by a claim of excessive force, which was supported by factual allegations that all defendants were present during the assault and that none intervened. By contrast, the Seventh and Eleventh Circuits have allowed failure-to-intervene claims even when they were not explicitly and separately pled in the Complaint.

The First and Sixth Circuits each have addressed this issue squarely. In *Calvi* v. *Knox County*, the First Circuit recognized that the plaintiff's "argument rests . . . on the proposition that a failure to intervene claim is implicit in an excessive force claim directed at multiple defendants." 470 F.3d 422, 431 (1st Cir. 2006). It held that "[w]e reject that proposition." *Ibid.*

Similarly, the Sixth Circuit, in *Thornton* v. *Spooner*, addressed claims of excessive force against a group of police officers. On summary judgment, the plaintiff argued that one officer failed to intervene when another twisted his head and neck. See 872 F.2d 1029 (tbl.), 1989 WL 34026, *3 (6th Cir. 1989) (unpub.). Even though the complaint alleged that that officer had engaged in excessive force, the court stated that "Thorton's complaint fails to allege a failure to intervene. Thus, even if Thorton's allegations on his briefs are true, he did not in his complaint state a claim sufficient on which to base relief." *Ibid.*

And in this case, the Second Circuit approved the District Court's denial of an instruction on failure to intervene, finding that "plaintiffs' proposed jury instruction would have introduced a new claim to the case." App., *infra*, at 3a. The court came to that conclusion even though Petitioners had alleged, and it

was undisputed, that each defendant was in the small apartment during the assault.

The Seventh and Eleventh Circuits have taken a different approach. In *Miller* v. *Smith*, the Seventh Circuit court addressed a fact pattern much like the one here. The plaintiff alleged that he was attacked by a group of officers late at night, when he was "groggy" and "lying face-down." 220 F.3d 491, 493 (7th Cir. 2000). The District Court had found that the plaintiff "could not bring excessive force claims against any of the officers because he could not specify which one of them attacked him." *Id.* at 494–95. The Seventh Circuit reversed, holding that "whichever officer was not directly responsible for the beating was idly standing by." *Id.* at 495. The court believed that allegations that one of the officers who did not participate in the beating was merely present were sufficient to take the case to trial on a failure-to-intervene theory. *Ibid.* ("If Miller can show at trial that an officer attacked him while another officer ignored a realistic opportunity to intervene, he can recover.")[3] Most importantly, the court focused not on the name of the cause of action, but on the facts: "Since [plaintiff] alleges facts to support these claims, they should not have been dismissed." *Ibid.*

Further, the Eleventh Circuit in *Campbell* v. *Lynch* affirmed the district court's ruling that "[a] reasonable jury could find [one defendant] failed to take reasonable steps to protect [plaintiff]." 264 F.

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[3] The Eleventh Circuit, too, has found that "evidence that [a defendant] was present during the encounter" supports an inference of opportunity to intervene and is thus sufficient to defeat summary judgment. *Byrd* v. *Clark*, 783 F.2d 1002, 1007 (11th Cir. 1986).

App'x 836, 837 (11th Cir. 2008) (unpub.). The court permitted the plaintiff to pursue that theory even though the complaint did not assert a claim called "failure to intervene" or allege that one defendant stood by while others used excessive force. See Cmplt., *Campbell* v. *Lynch*, N.D. Ga. No. 06-cv-00114, App., *infra*, 38a–41a. In fact, the complaint did not even use the phrase "excessive force." *Ibid.* Nonetheless, the court found that failure-to-intervene liability was part of the case.

As it stands, a plaintiff alleging liability for excessive force could be subject to a different pleading standard depending on the Circuit in which he brings his case. This result is especially unfair in light of the fact that many such plaintiffs will file their pleadings *pro se*. Viewed from the perspective of defendants, a more generous reading of pleadings will create little or no prejudice. A police officers' duty to intervene to stop the use of excessive force is well-established. Thus, an officer accused of participating in the use of force, who concedes being part of the group of officers at the scene, should be on notice that those facts could establish a failure to intervene. This Court should grant review to clarify the pleading standard and impose uniformity.

CONCLUSION

The petition for a writ of certiorari should be granted.

Respectfully submitted.

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AUGUST 2010

APPENDIX A

[Opinion of the United States Court of Appeals for the Second Circuit (May 12, 2010)]

No. 09-2945-PR, 2010 WL 1881036 (2d Cir. 2010)

UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

SUMMARY ORDER

At a stated term of the United States Court of Appeals for the Second Circuit, held at the Daniel Patrick Moynihan United States Courthouse, 500 Pearl Street, in the City of New York, on the 12th day of May, two thousand ten.

PRESENT: GERARD E. LYNCH,
DENNY CHIN,
Circuit Judges.*

SEAN STEPHEN AND DARYL STEPHEN,

Plaintiffs-Appellants,

v.

JOHN HANLEY, POLICE OFFICER #13199; EDGAR BOURDON, POLICE OFFICER #30988; RLENDEAU, SUPERVISOR; ILIADIS, POLICE OFFICER; BRILL, POLICE

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* At the time of oral argument, Judge Chin was a District Judge sitting by designation. The Honorable Rosemary S. Pooler was originally a member of this panel, but did not participate in the consideration of this appeal. The two remaining members of the panel are in agreement and have determined the matter. *See* 28 U.S C § 46(d); 2d Cir. I.O.P. E; *United States v. Desimone*,140 F.3d 457 (2d Cir. 1998).

OFFICER; COLEMAN, POLICE OFFICER; WHITE, SST., SUPERVISOR; TOOL TEAM, NYC POLICE SERGEANT HERNANDEZ; POLICE OFFICER DEREK DUNSTON; MILLER; CITY OF NEW YORK; AND WARMOUTH, OFFICER,

Defendants-Appellees.

FOR APPELLANTS: DAVID MCGILL (Joseph De Simone, on the brief), Mayer Brown LLP, New York, New York.

FOR APPELLEES: SUSAN B. EISNER (Stephen J. McGrath, Afsaan Saleem, and Caroline Chen, on the brief), for Michael A. Cardozo, Corporation Counsel of the City of New York, New York, New York.

Appeal from a judgment of the United States District Court for the Eastern District of New York (Kiyo A. Matsumoto, Judge).

UPON DUE CONSIDERATION, IT IS HEREBY ORDERED, ADJUDGED, AND DECREED that the judgment of the district court is AFFIRMED.

Plaintiffs Sean Stephen and Daryl Stephen appeal from a final judgment entered after a jury verdict on their 42 U.S.C. § 1983 claims alleging excessive force in violation of the Fourth Amendment. We assume familiarity with the facts and procedural history, which we reference only as necessary to explain our decision.

Early on July 10, 2002, Sean Stephen and his fourteen-year-old son were sleeping in a Brooklyn apartment. Police officers forcibly entered the premises pursuant to a search warrant. Plaintiffs alleged that the officers used excessive force against them. The jury found in favor of defendants, except that it awarded nominal damages to Daryl Stephen

against defendant Brill. Judgment was entered accordingly.

On appeal, plaintiffs contend that the district court erred by (1) refusing to instruct the jury on a law enforcement officer's affirmative "duty to intervene" to prevent constitutional violations committed by other officers in their presence; (2) declining to excuse two jurors for cause; and (3) overruling three out of plaintiffs' four Batson objections to defendants' peremptory strikes against African-American members of the panel.

With respect to the district court's refusal to give a "duty to intervene" jury instruction, we affirm. We see the issue not as whether a police officer has a duty to intervene, but whether the district court abused its discretion in declining to permit plaintiffs to introduce a new theory of liability at trial. Plaintiffs' fourth amended complaint did not give defendants notice that plaintiffs intended to pursue a "duty to intervene" theory of liability, and thus plaintiffs' proposed jury instruction would have introduced a new claim to the case. In essence, plaintiffs were seeking leave to amend their complaint as trial was about to commence. We find no abuse of discretion in the trial judge's decision to deny plaintiffs leave to introduce a new theory of liability at that late juncture in the proceedings. See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87, 108 (2d Cir. 2007) (denial of leave to amend reviewed for abuse of discretion).

Although plaintiffs now argue that it was "impossible" for them to identify their specific attackers, and that a "duty to intervene" charge was therefore essential to their ability to recover from defendants, plaintiffs' fourth amended complaint -- which was

drafted by counsel (plaintiffs' prior attorney) -- did not proceed on this theory. Instead, the fourth amended complaint made specific factual allegations regarding each defendant's individual actions -- for instance, it alleged that "defendant Iliadis struck plaintiff Sean Stephen with a baton"; "defendant Hayden struck plaintiff Sean Stephen in his jaw with a closed fist"; and "defendant Miller tightly handcuffed [plaintiff] Sean Stephen . . . and deliberately pushed him into a wall." Plaintiffs alleged no facts in the pleading to suggest that it was difficult to ascertain each defendant's role in the assaults or that they intended to proceed on a "duty to intervene" theory of liability.

Furthermore, while it is true that plaintiffs raised this issue some eight weeks before trial by including a "duty to intervene" charge in their proposed jury instructions, defendants objected to the proposed charge, and neither side brought the issue to the district court's attention until the final pretrial conference, just a few days before the beginning of trial. The trial judge's decision not to permit plaintiffs to introduce a new theory of liability at that point, on the grounds that defendants would be prejudiced by such a late amendment, was well within her discretion.

As for the plaintiffs' argument that certain jurors should have been excused for cause, we note that "[t]he process of empaneling a jury is firmly entrusted to the sound discretion of the trial judge and will not be disturbed absent an abuse of this discretion." United States v. Rubin, 37 F.3d 49, 54 (2d Cir. 1994). The trial judge questioned the two challenged jurors about their potential biases in detail. Based on their responses, she determined that the jurors

could be fair and impartial. Her determinations were not clearly erroneous. In any event, one of the jurors in question was eventually removed from the panel by a peremptory challenge. See Ross v. Oklahoma, 487 U.S. 81, 88 (1988) ("So long as the jury that sits is impartial, the fact that the defendant had to use a peremptory challenge to achieve that result does not mean the Sixth Amendment was violated."). As for the other juror, when the district court ruled that it would seat her because "she is fairly committed to try to be fair and impartial and not to make any decision before the evidence is in," plaintiffs' counsel said, "I agree." See United States v. Ragland, 375 F.2d 471, 475 (2d Cir. 1967) ("Failure to object to the composition of the jury has long been held to result in a waiver of the right of the accused to be heard by an impartial jury.").

Finally, with regard to the Batson challenges, a trial court's determination, under Batson v. Kentucky, 476 U.S. 79 (1986), as to the existence of discriminatory intent in the exercise of peremptory challenges -- or the lack thereof -- is a factual determination that should be set aside only if "clearly erroneous." Hernandez v. New York, 500 U.S. 352, 369 (1991). The trial judge questioned defense counsel about their use of peremptory strikes against African-American jurors. She determined that counsel were not motivated by impermissible racial bias. The trial judge was in the best position to assess demeanor and credibility, see United States v. Breen, 243 F.3d 591, 598 (2d Cir. 2001), and we find no reason to overturn her determinations.

We have considered plaintiffs' remaining arguments on appeal and conclude that they are without

merit. For the foregoing reasons, the judgment of the district court is AFFIRMED.

FOR THE COURT:
CATHERINE O'HAGAN WOLFE,
Clerk of Court

APPENDIX B

[Ruling on Plaintiff's Proposed Jury Instruction and Excerpts of Oral Argument in the United States District Court for the Eastern District of New York (June 1, 2009)]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SEAN STEPHEN AND DARYL STEPHEN,
Plaintiffs,

v.

P.O. JOHN HANLEY, P.O. EDGAR BOURDON, SERGEANT JUAN WHITE, P.O. MICHAEL ILIADIS, P.O. TERRANCE BRILL, P.O. PATRICK COLEMAN, P.O. DEREK DUNSTON, P.O. RICHARD MILLER, DETECTIVE JOSE HERNANDEZ,
Defendants.

No. 03-CV-6226 (KAM)

U.S. Courthouse Brooklyn, N.Y.

Jury Selection

TRANSCRIPT OF PROCEEDINGS

BEFORE:

HONORABLE KIYO A. MATSUMOTO, U.S.D.J.

* * *

[Tr. 4] Afsaan Saleem for the defendants.

THE COURT: Good morning.

MS. CHEN: Good morning, Your Honor.

Caroline Chen for the defendants.

THE COURT: Good morning.

All right. We have a few preliminary issues to deal with. One is that when we call the jurors in, we have a panel coming in, I'm going to ask for all of the spectators to sit together towards the back. I don't want to have interaction between anyone who is a spectator and one who may be a juror. So I may have to ask those who are in the back there, if you're not going to be part of the jury selection, and I'm sure you're not, just to move to one side and stay together and not interact with the jurors.

We had, also, an issue about whether or not a jury charge would be given on the failure to intercede. And the Court has reviewed the submission of the parties and the pleadings, the fourth amended complaint, and is prepared to rule that that claim is not going to be part of this case.

The court's require that a failure to intervene claim must be pled with sufficient particularity by naming [Tr. 5] which defendants are allegedly liable for failure to intervene with respect to each particular incident. And that's a case out of Southern District; Atkins versus County of Orange.

Court's have, occasionally, in the circuit, read duty to intervene cause of action into the complaint without granting leave to amend. However, in those instances, those are the cases in which the plaintiff was proceeding pro se, and therefore would be entitled to a more liberal reading of the complaint.

The Second Circuit has approved a District Court's granting leave to amend a complaint that adds a duty to intervene theory of liability after summary judgment was granted in favor of the defendants. And the Court recognizes that the court --

the Second Circuit found no error in the District Court's refusal to consider the plaintiff's excessive force claim that she failed to plead after being granted leave to amend her complaint.

In this case, we've had four amended pleadings, the most recent of which was with counsel. And it-appears to me that that claim has not been sufficiently pled against some of the officers that are before the Court today.

I think the only allegation that even hints is -- about the officers being present, is that on or about July 10th, 2002, at approximately 4:30 a.m., defendants forcibly entered the subject premises pursuant to a search warrant. [Tr. 6] There's nothing else that really suggests a failure to intervene claim. I mean, other than there are officers --defendant officers who entered the premises pursuant to warrant. And the Court does not find that sufficient to state a failure to intervene claim under the circumstances.

Now, the question is whether or not the Court should allowed a pleading at this late date. I will certainly hear from the parties on that, if they wish to be heard orally now. As you know, it is liberal pleading -- under Rule 15, a liberal amendment rule, in fact, the Court can amend after the trial. But my concern is the fact that this comes very late. That the plaintiffs had numerous opportunity to amend their complaint. That they have been represented by counsel all along. And I'm very concerned about the prejudice to the individual defendants named in this case, but I will hear from you if you wish to be heard.

MR. McGILL: Your Honor, may I be heard on that?

THE COURT: Yes.

MR. McGILL: First, I would just note that with respect to this particular issue, defendants were on notice as to the dispute about whether duty to intervene was in this case by no later than, I believe it was April 1st of this year when we proposed our jury instruction on this issue.

Apart from that, defendants had the opportunity to depose our clients for seven hours in this case. And they [Tr. 7] asked extensive questions about where each officer was, what they were doing and what our clients observed.

During the course of the depositions that we took of defendants, we also asked similar questions. In particular, for instance, with Officer Brill, we asked him whether he had ever seen excessive force used and what's he supposed to do when he says excessive force used during the execution of search warrants.

Sean Stephen was asked, you know, why he was suing Sergeant White in this matter. And he said that he was there, he was part of this, he saw what was happening and he did nothing to stop them.

There are similar questions and answers in all of the deposition transcripts. So we would argue if this issue is really about notice, there's really no prejudice to the defendants at this point. They were on notice of this issue during the depositions. And certainly, no later than April 1st of this year when we proposed the jury instruction.

THE COURT: I guess I'm not hearing any explanation as to why you didn't move to amend or to formally make this clear to the defendants, when you're suing individual defendants, and I think they have a right to know what the claims are against them. And the fact that depositions may have been

taken doesn't necessarily solve the problem if counsel are not necessarily aware that there is a claim that [Tr. 8] you're bringing that hasn't been pled in the pleadings.

How are they to know, despite the fact that they have the opportunity to take depositions or to prepare their witnesses for depositions, that this is a claim that they need to be ready to defend?

MR. McGILL: Well, Your Honor, in the fourth amended complaint all of the defendants are alleged to have-violated plaintiffs' constitutional rights. Apart from that, there's some very specific allegations as to certain officers. But for, instance, with respect to Sergeant White and Officer Dunston, there are no specifically detailed allegations regarding the use of excessive force.

If defendants had the view that there had to be such specific allegations as to each defendant, then why are those defendants still in the case? Why didn't they move to dismiss those defendants. I think defendants a little disingenuous to say that they were not on notice as to claims apart from those specifically pled allegations of excessive force because there are other defendants in this case.

And in addition, Sergeant White, in particular, is alleged in the fourth amended complaint to be -- to have acted in his capacity as supervisor during the day in question.

THE COURT: The last complaint, the fourth amended complaint, was filed by counsel. And it was, `I believe, if I'm not mistaken, up to 2006. [Tr. 9]

MR. McGILL: I don't have the particular date in mind, Your Honor. Our predecessor counsel did file that complaint.

THE COURT: Here we are three years later, on the day of trial, and, you know, the complaint hasn't been amended, frankly. I think that it does raise, in the Court's view, a question of dilatory action, delay, prejudice, and all of those other factors that militate against an amendment.

You know, I understand what you're saying. That in your view this was -- may been vetted. Now, I'm not sure that's the case. I haven't read all the depositions. I cannot say and charge the defendants with notice of claims that have not be pled. Especially if, given that there are four amended complaints, certainly somebody could have raised the issue at some point prior to today.

MR. McGILL: Well, Your Honor -- I'm sorry to interrupt, Your Honor.

THE COURT: Go ahead.

MR. McGILL: I just wanted to reiterate that defendant were put on notice certainly no later than April 1st.

THE COURT: Do you have something in writing saying that we are charging your clients, your individual clients, with failure to intervene? Is there something to that effect, or are they just to infer notice based on your questions? [Tr. 10]

MR. McGILL: No, Your Honor. The proposed jury instruction itself makes very clear that we were alleging defendants to be held liable on a serious duty to intervene as of April 1st of this year. That's two months ago.

THE COURT: They didn't agree to it and the dispute arose because they said it's not in the complaint.

MR. McGILL: Understood, Your Honor. But if the issue is noticed, there's no question they had notice as of April 1st. And if they contend that they didn't have sufficient discovery on the issue, you know, we would have been amendable to having a continuation of the plaintiffs' depositions at that point in time.

THE COURT: Well, as I recall, it was the plaintiffs who were very eager to get a trial date, a trial date that was going to be sooner rather than later. I'm completely supportive of that given the age of this case, but let me hear from the defense, if I may, on this.

MR. SALEEM: We agree with Your Honor's ruling. By the time the issue had come up, discovery had dined. I don't see how defendants could have been put on notice when it's several months before the end of the case. As Your Honor correctly points out, it was not pleaded in the complaint.

And that's the whole purpose of a complaint, is to put the parties on notice.

There are nine individual defendants, they were not [Tr. 11] put on notice that this is a claim against them. The individual complaint also alleges specific acts against each of the defendants. It does not state that this individual -- any of the individual defendants were present and observed a violation of constitutional rights against other defendants. Sergeant White is a supervisor. Yes, that's his role as a supervisor, to supervise.

So we just agree with Your Honor's ruling. And I don't see how plaintiffs can even make an argument that there's no prejudice when the discovery had been closed for several months when this issue first came to light during the pretrial submissions.

MR. McGILL: Your Honor, if I might just be heard briefly in response?

THE COURT: Yes.

MR. McGILL: Just, again, I think with respect to the issue of prejudice, defendants have all stipulated that they were present at the apartment. So they were on notice as of July 2002 that they were there. They knew they were. That's not an issue in this case anymore. So for them to claim that they had no notice that there are allegations that they were present, I mean, it just doesn't ring -- it rings hollow to me, Your Honor.

I think, again, Mr. Saleem indicated there were specific allegations against all the defendants. That's just [Tr. 12] not the case. It was specific allegations against seven of the defendants, but two other people were included in that complaint. And all of the defendants were alleged to have violated constitutional rights of defendant.

THE COURT: You just left the burden on the defendant saying that with respect to the other two defendants against who specific allegations were made, it's now their burden to dismiss. No. It's your burden to prove against each and every one of the defendants and to prove that they violated the plaintiffs' constitutional rights.

I'm just not convinced or persuaded that mere presence is sufficient to establish a failure to inter-

vene, because there is nothing about that in the complaint. I've looked. We've had four amendments. So, I'm just -

MR. McGILL: Your Honor, just on the issue of prejudice here, though, I think if you look at defendants submission to the Court on this issue, they allege, generally, that, you know, they didn't have opportunity to take discovery, but they really couldn't identify a single additional question that they would have asked the plaintiffs, and they are both going to testify in this case as the third parties. They'll have the opportunity to cross-examine these witnesses. I just don't see any degree of prejudice if we're allowed to amend at this juncture.

THE COURT: Mr. Saleem, do you want to respond, or [Tr. 13] Ms. Chen? They're saying that, basically, you've had all the discovery you'd need to defend against a failure to intervene claim.

MR. SALEEM: That's a ludicrous assertion, Your Honor. Again, the plaintiffs asked several questions of our officers in depositions. Questions like did they go to high school? There's no claim in the case that the officers didn't go to high school. So saying that just because questions could have been asked or were asked at a deposition somehow puts us on notice is not a very good argument, Your Honor.

I think Your Honor has ruled the Supreme Court recently issued last month about how the pleadings have to be construed, and they just can not make this argument this late in the game. It's complete prejudice.

THE COURT: All right. Well, the Court, as I stated, finds that the failure to intervene claims have not been sufficiently alleged so as to put the defen-

dants on notice. And that there has been far too much time delay at this late juncture to grant an amendment.

I believe that there would be undue prejudice to the individual defendants to try to defend against these claims at this time. So the Court is not going to read something into the pleadings that is not there. Nor will the Court, at this late date, grant an amendment.

MR. KADISH: Right. And just so we're clear, [Tr. 14] initially, the question was jury instruction. It seemed that the Court gave us a little room with respect to amending the complaint even at this late date. I assume that you're ruling that we can not amend.

THE COURT: I understood that the next step, since I had ruled against the instruction, would be, Well, then let us amend. So I thought I would I take care of that now.

MR. KADISH: Okay.

THE COURT: So that the parties have a fair notice of how this trial is going to proceed and what the proper scope of inquiry will be with respect to the witnesses, and what charges are being brought and which charges need to be defended. So, yes, it was a two step process with respect to the instruction issue and with respect to the amendment of the pleading.

MR. McGILL: Your Honor, if I might just suggest one other alternative --

THE COURT: Yes.

MR. McGILL: -- sensitive to the Court's timing of things. I just wanted to suggest that one possibility would be for the Court to reserve on this issue un-

til the charging conference and see if we're able to prove, if we're able to make the proper evidentiary showing that these specific defendants were present during specific acts of excessive force, did nothing to stop it when having the right and the [Tr. 15] ability to do so. I think that that would be a fair compromise under the circumstances.

THE COURT: Well, the only concern I have is if, in the process of doing that, the defendants have one arm tied behind their back because they haven't had the opportunity to take sufficient discovery on this issue. It just wouldn't be fair to make a record of that and then say well, based on this record we should now amend, if the defendants haven't had the opportunity or the ability to defend.

MR. McGILL: I understand the issue, Your Honor, but the defendants have knowledge of where they were during the incident. That's within their particular knowledge, Your Honor. They should know where they were during the event. So that's not really an issue for discovery.

THE COURT: I'll tell you what can do. I'm standing by my ruling. If you want to, after the evidence is in, raise the issue again, I'll hear from you. But I'm not inclined to grant it. I still think there's a high level of prejudice to the defendants at this point.

MR. McGILL: Thank you, Your Honor.

THE COURT: Now, with respect to the jury selection, as we discussed, we're going to seat 18 prospective jurors. Each side will have the opportunity to strike three peremptory jurors. I read through the voir dire. I think that most of it is acceptable. What I tried to do is combine the two

APPENDIX C

[Excerpts from the Trial Transcript of Proceedings in the United States District Court for the Eastern District of New York (June 1, 2009)]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SEAN STEPHEN AND DARYL STEPHEN,
Plaintiffs,

v.

P.O. JOHN HANLEY, P.O. EDGAR BOURDON, SERGEANT JUAN WHITE, P.O. MICHAEL ILIADIS, P.O. TERRANCE BRILL, P.O. PATRICK COLEMAN, P.O. DEREK DUNSTON, P.O. RICHARD MILLER, DETECTIVE JOSE HERNANDEZ,
Defendants.

No. 03-CV-6226 (KAM)

U.S. Courthouse Brooklyn, N.Y.

TRANSCRIPT OF PROCEEDINGS

BEFORE:

HONORABLE KIYO A. MATSUMOTO, U.S.D.J.

* * *

[Tr. 20] reminders of what happened to them, they will be able to tell you who did what to them on that date. They will be able to tell you which of the defendants stood by and watched as the abuse is happening and did nothing to stop them.

MR. SALEEM: Objection.

THE COURT: Sustained. The jury will disregard the last comment about the defendants standing by and doing nothing to stop it. Please disregard that statement.

MR. McGILL: May I approach?

THE COURT: Yes, you may.

(Side-bar conference held on the following page.)

[Tr. 21] (Side-bar held.)

MR. McGILL: Your Honor, my understanding of your ruling from earlier today was that we would have the opportunity to make an evidentiary showing that defendants' proposition about this issue with the police, that you were reserving final ruling on the issue until the charge conference.

THE COURT: No. I ruled that that claim is not in the case and that if -- and that you are not to introduce evidence. You should not be introducing evidence regarding this claim if -- and referring to it as though there is such a claim.

If there's evidence, at the end of the day, in the record, that demonstrates that -- you know, I'm not comfortable with having this in the record at all, because I ruled that this is not part of your case and that you could make -- you could bring your motion or your application, but -- to amend, but that I had not granted your application to amend. And I'm not going to allow you to put in evidence on this claim that is not in the case in hopes of then moving to amend the complaint after trial.

MR. McGILL: I don't understand how I'm going to be able to tell the story of what happened without saying which officers were where when this thing happened.

THE COURT: Well, you can say which officers were [Tr. 22] where. You just are not allowed to argue that these officers did nothing and failed to intervene. That is not in the case.

MR. McGILL: So you're saying --

THE COURT: Your statement to the jury that these officers stood by and did nothing is not an appropriate statement.

MR. SALEEM: One other thing, Mr. McGill also mentioned particularly the fact that the officers didn't -- didn't offer any medical treatment. There's no denial of medical treatment claim. That's something that he pled separately. I take exception to him discussing that. There's no claim, there's no separate claim of denial of medical treatment.

I also take exception to the fact that with regard to the stipulation that the timing of the search warrant is not a claim the plaintiffs are claiming in this case. I take exception to that. They don't mention the time of the search warrant.

MR. McGILL: Your Honor, their refusing to provide medical attention clearly goes to damages and clearly goes to the trauma that the defendants didn't allow them medical attention. This is all part of the trauma that was sustained.

MR. DeSIMONE: It goes to punitive damages, as well, Your Honor. The egregious nature of it. They wouldn't just make a phone call. They say just put a band-aid on it. They

APPENDIX D

[Excerpts from the Trial Transcript of Proceedings in the United States District Court for the Eastern District of New York (June 5, 2009)]

IN THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SEAN STEPHEN AND DARYL STEPHEN,
Plaintiffs,

v.

P.O. JOHN HANLEY, P.O. EDGAR BOURDON, SERGEANT JUAN WHITE, P.O. MICHAEL ILIADIS, P.O. TERRANCE BRILL, P.O. PATRICK COLEMAN, P.O. DEREK DUNSTON, P.O. RICHARD MILLER, DETECTIVE JOSE HERNANDEZ,
Defendants.

No. 03-CV-6226 (KAM)

U.S. Courthouse Brooklyn, N.Y.

TRANSCRIPT OF PROCEEDINGS

BEFORE:

HONORABLE KIYO A. MATSUMOTO, U.S.D.J.

* * *

[Tr. 971] THE COURT: Good morning.

Have a seat everybody.

THE COURT: Are you ready to start, counsel?

MS. SANTIAGO: Yes.

THE COURT: Okay. I think that what I'd like to do is just go through some of these issues. It ap-

pears I have reviewed the plaintiff's June 4th submission in which they ask again to have reconsideration of the Court's ruling regarding the failure or the duty to intervene instruction.

Now, this is the Court's view in terms of reconsideration. As you know, you have to point to case law or facts that were overlooked that couldn't have been presented earlier.

My concern is this. The plaintiffs argue that in a prior pleading there were specific allegations that particular officers were present while another officer allegedly engaged in excessive force against one of the plaintiffs.

Ultimately, however, that complaint was amended and superseded. The effect of an amendment is to supersede and to [Tr. 972] present a new set of claims and allegations and the governing complaint in this case is the fourth amended complaint. I've looked through that complaint and there are no facts that specifically alert the defendants to the plaintiffs' view that certain defendants were present, had the opportunity to observe a violation of a constitutional right and failed to intervene to stop it.

The-cases that the plaintiffs cite, at least, are articulate facts that would notify the defendants that they are being accused or charged with a failure to intervene, either because facts allege that they were present or that they were involved or that they were within the proximity of the alleged constitutional violation and failed to intervene.

Now, the mantra is not failed to intervene, those words don't have to appear in the pleading, but the facts have to notify the defendant that it is alleged

that they were present and had the opportunity to, and the ability to observe.

The defendants have objected from the-time. they were first advised via the jury instruction in April that the plaintiffs were proceeding on that theory. It is undecided in the Second Circuit whether or not it has to be pled as a separate cause of action, and I appreciate that the plaintiffs cited cases -- district court cases where the claim wasn't specifically pled as a separate cause of action, but as I [Tr. 973] said, in those cases the facts supported and gave sufficient notice to the defendants that they were being -- that they had faced exposure for a failure to intervene, and if one looks again at the fourth amended complaint which superseded whatever allegations might have been made against specific allegation thee is a total absence of any appropriate notice.

Now, the plaintiffs' fourth amendment complaint was filed with counsel -- with the assistance of counsel in February of 2006. Mayer Brown substituted in, in February 2007. Even after the plaintiffs proposed the jury instructions some time in April after discovery had been closed and when we were in the process of preparing the final pretrial order, the plaintiffs did not attempt to amend the pleadings.

Now, the pleadings, as you know, define what is relevant in a case. It defines the scope of discovery and it defines what can come in at trial.

Now, I grant you, you have cited some discovery depositions where the parties may have explored or touched upon the issue of a failure to intervene, and some evidence may have come in at trial regarding that issue, but ultimately, it appears to me that it

would be not only prejudicial to the defendants to bring the claim and to expose them to this liability, but there has just been no adequate explanation as to why something wasn't done to amend the [Tr. 974] pleadings -- not to specifically state I am claiming that you failed to intervene, because we don't know whether the Second Circuit will require a separate cause of action, but some facts to notify each defendant what he or she -- what he did with respect to a failure to intervene charge.

There has been no amendment to specified facts as to each defendant, that they were present, or in a position to observe. So very reluctant, given the prejudice, given the delay, given the lack of any reasonable explanation for delay. I cannot speculate at this time what the defendants might have done differently -- whether there are other witnesses that they might have deposed.

We have evidence or information and I'm just relying on what came in in the court record, but other officers were there. Officer Dunston's supervising officer, a sergeant Matthews, an Inspector Marino were present. I don't know whether the defense trial strategy would have changed had they known that there were some exposure for those defendants. It's hard for me to speculate, but I'm concerned that it's just too late, and there is a pleading that doesn't support instruction and for that reason, I am inclined to deny this instruction because I think it's at this point inappropriate.

MR. KELBLEY: Your Honor, may I be heard?

THE COURT: Absolutely.

MR. KELBLEY: I appreciate the position you are in. [Tr. 975] We have a recent supplemental to

yesterday's letter motion and we have good cause. At the times our letters were written we were not in possession of the underlying complaint in Anderson v. Brainon (ph) because they were out in the national archives. We took a look at them an we can now represent to the Court that these complaints contained no separate claims regarding the duty to intervene. They are not pro se. They were represented by Simpson Thatcher the entire way.

As in the instant case the Brainon plaintiffs alleged that law enforcement officials violated their constitutional rights under the Fourth Amendment by using exceptional force interrogatory evidence. As in the instant, there were several amended complaints filed by counsel. No separate claims for duty to intervene was ever pled.

As in the instant case, the plaintiffs first addressed the duty to intervene charge in a proposed jury instruction, just as we did, and as in the instant case, the trial court denied plaintiffs' request to charge regarding the duty to intervene.

THE COURT: Well, let's just stop you right there.

One: Why wasn't this presented to me before today?

The pleadings presumably were available to you and accessible to you over the seven years this case has been pending or six years. Forgive me.

Second of all, I don't know still, as I sit here [Tr. 976] now, whether those complaints alleged specific facts, whether or not it was categorized as a separate claim and again, that has not been decided by the

circuit, but I don't throw whether those facts in those pleadings were alleged to give somebody notice that -

MR. KELBLEY: I understand. I apologize for the delay. We didn't really -- we briefed this issue and we cited the case. We thought we had enough other cases with complaints that didn't separately plead, that were adequate, and it is very difficult to find. We had to go to the national archives to get it.

What I want to continue with, just briefly and then I'll get back to your point, was that on appeal the Second Circuit found the trial court had erred in refusing to include in its charge to the jury plaintiff's proper instruction, and said it was prejudicial error and remanded the case for a new trial, essentially, and so, I'm concerned based on these facts that we might have a similar situation here.

I have the complaints for Your Honor, and obviously we defer to Your Honor, if you'd like to review them, and you know, if you see in these complaints the kinds of allegations you think that would put someone on notice. You know. Obviously, you know, that would be a different situation. We don't personally see them but we have them here for your examination.

[Tr. 977] THE COURT: Well, have you provided the defense with copies of everything?

MR. KELBLEY: I actually only have one copy.

THE COURT: Well, I am not taking -- well, we can make a copy for the defendants but it is really -- delay equals prejudice in my mind. I understand that the allegations are very serious and I appreciate that Mr. Sean and Daryl Stephen have very serious allegations, but I also appreciate the defendants are

being charged with these very serious allegations, and my concern is that to present something to me now and to the he defendants, something I have not yet seen and the defendants haven't yet seen, it is very prejudicial.

MR. KELBLEY: I understand.

THE COURT: I will be happy to look at your submissions, but I want to make sure the defendant has had an opportunity. I really real think at this late date, honestly, I think it is very prejudicial. I will hear from the defense before I move forward.

MS. SANTIAGO: Thank you, Your Honor.

We would absolutely concur with that. The fact that we have been blind sided the with this at, literally, the eleventh hour, the day that we expect to sum up in this case clearly demonstrates how we've been prejudiced.

Certainly, there, Your Honor has rightfully pointed [Tr. 978] out that there are no factual allegations contained in the Fourth Amended complaint which would put us on -- the defendants on notice that this was a theory of liability that was going to be pursued by the plaintiffs.

While I have also looked at the plaintiffs' submission with respect to the Anderson V Brainan case, and I will just like to point out that at no time does the Second Circuit say in that case that facts regarding a failure to intervene claim does not have to be pled in a complaint.

The Court notes -- Second Circuit notes the case law establishing that officers do have an affirmative duty to intervene. However, with any constitutional violation alleged they have an affirmative duty not to

engage in the complaint conduct. For example, officers have an affirmative duty not to arrest people on less than probable cause, and certainly, that is a cause of action that must be pled in a complaint, if not use the term false arrest, but certainly, facts that would give the other side notice that that was a claim that was going to be pursued, and that is completely absent in this case. It was not in the complaint, it was not in the joint pretrial order, and certainly, previously, because of position certain parties have taken in the joint pretrial order, Your Honor has made the parties bound by that, and we would ask that you continue to do so, for the reasons that I have just mentioned, as well as extreme prejudice.

[Tr. 979] THE COURT: I mean, if anything, the prior complaint that you rely on, the March 17, 2004 complaint, in which the plaintiffs point out that they alleged that Defendant Miller saw excessive force and Defendant Dunston watched excessive force being used against the plaintiffs, that may have been adequate, but it was superseded by the fourth amended complaint, and that was dropped out. So, if anything, it had the effect of-putting plaintiffs on notice that they weren't going to be facing exposure or failure of their duty to intervene.

If anything it would have lulled the defendant into thinking: All right. Well, that's not a theory under which we face exposure. And again, you know, for me to try to -- it's prejudicial, I have no doubt, and I do believe that the opening statement could have been different. Had they known, I believe, the witnesses that they might have called would have been different. Indeed, their summations, which are going to be given today, are probably going to be dif-

ferent based on that. So I really have to say, counsel, that it's just too late in the game.

MR. KELBLEY: Okay. I just wanted to note our objection, for the record.

THE COURT: All right. Duly noted.

We had some other issues. I think what I'll do is I don't think the plaintiffs raise any other issues of great

* * *

[Tr. 1198] defendants had less intrusive alternatives available, for the defendants need only have to have acted within a range of conduct identified as reasonable.

If you find that the amount of force used was greater than a reasonable person would have employed, the plaintiffs will have established the claim of loss of a federal constitutional right.

23. Element three: Proximate cause.

The third element which each plaintiff must prove is that the acts of a particular defendant who you are considering were a proximate cause of the injuries sustained by the plaintiff. Proximate cause means there must be sufficient causal connection between an act or omission of a defendant that deprived a plaintiff of his federal right and any injury or damage sustained by the plaintiff.

An act or omission is a proximate cause if it was a substantial factor in bringing about or actually causing injury; that is, if the injury or damage was a reasonably foreseeable consequence of the act or omission. If an injury was the direct result or a reasonably probable consequence of a particular act or

omission, then that injury was proximately caused by such act or omission.

In other words, if a defendant's act or omission had such an effect in producing the injury that reasonable persons would regard it as being a cause of the injury, then the act [Tr. 1199] or omission is a proximate cause.

In order to recover damages for any injury, each plaintiff must show by a preponderance of the evidence that such injury would not have occurred without the wrongful conduct of the defendant that you are considering.

A proximate cause need not always be the nearest cause either in time or in space. In addition, there may be more than one proximate cause of an injury or damage. Many factors or the conduct of two or more people may operate at the same time, either independently or together, to cause an injury.

With respect to intent.

It is not necessary to find that the defendant you are considering had any specific intent to deprive the plaintiffs of their constitutional or civil rights in order to find in favor of a plaintiff as to that defendant. Regarding intent, the plaintiffs need only prove that the defendant you are considering intended the actions which resulted in the violations of the plaintiff's rights or that he acted recklessly in that regard. An act is intentional if the actor knows he or she is doing it; that is, if it is done voluntarily and deliberately and not because of mistake, accident, negligence or other innocent reason. An act is reckless if it is done in conscious disregard of its known probable consequences.

APPENDIX E

[Excerpts from the Fourth Amended Complaint and Jury Demand (Feb. 4, 2006)]

THE UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SEAN STEPHEN AND DARYL STEPHEN,
Plaintiffs,

against

P.O. JOHN HANLEY, SHIELD NO. 131966, P.O. EDGAR BOURDON, SHIELD NO. 30988, SERGEANT JUAN WHITE, P.O. MICHAEL ILIADIS, P.O. TERRANCE BRILL, P.O. STEVEN HAYDEN, P.O. PATRICK COLEMAN, P.O. EKEYTHIA DUNSTON, P.O. RICHARD MILLER, DETECTIVE JOSE HERNANDEZ,
Defendants.

No. 03-CV-6226 (DGT)(LB)

FOURTH AMENDED COMPLAINT AND JURY TRIAL DEMAND

Plaintiffs, SEAN STEPHEN and DARYL STEPHEN, by their attorney, ALAN D. LEVINE, ESQ., complaining of the defendants herein, respectfully allege as follows:

* * *

[Compl. 4] 21. On or about July 10, 2002, at approximately 4:30 A.M., defendants forcibly entered the subject premises pursuant to a search warrant.

* * *

23. At the time the individual defendants entered into subject premises as aforesaid, they were acting under the command of defendant WHITE.

* * *

[Compl. 5] 31. The individual defendants violated plaintiff SEAN STEPHEN's right to be free from illegal searches and seizures and his right to the due process of law guaranteed to him by the fourth and fourteenth amendments to the Constitution of the United States in that the individual defendants, acting under color of state law, without any cause or provocation whatsoever, illegally entered the premises where he lived with members of his family and brutally and severely beat and humiliated him.

* * *

[Compl. 6] 43. In addition to the improper, intentional and unprovoked physical injuries he had inflicted upon him as a result of the aforementioned batteries, plaintiff DARYL STEPHEN was also compelled to be a witness to the improper, intentional and unprovoked physical injuries inflicted upon his father, plaintiff SEAN STEPHEN.

44. The individual defendants violated plaintiff DARYL STEPHEN's right to be free from illegal searches seizures and his right to the due process of law [Compl. 7] guaranteed to him by the fourth and fourteenth amendments to the Constitution of the United States in that the individual defendants, acting under color of state law, without any cause or provocation whatsoever, illegally entered the premises where he lived with members of his family and brutally and severely beat and humiliated him.

APPENDIX F

[Excerpts from the Proposed Jury Instructions (Apr. 7, 2009)]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SEAN STEPHEN AND DARYL STEPHEN,
Plaintiffs,

v.

POLICE OFFICER JOHN HANLEY, SHIELD NO. 13166, POLICE OFFICER EDGAR BOURDON, SHIELD NO. 30988, SERGEANT JUAN WHITE, POLICE OFFICER MICHAEL ILIADIS, POLICE OFFICER TERRANCE BRILL, POLICE OFFICER PATRICK COLEMAN, POLICE OFFICER DEREK DUNSTON, POLICE OFFICER RICHARD MILLER AND DETECTIVE JOSE HERNANDEZ,
Defendants.

No. 03-CV-6226 (KAM)

ECF CASE

PROPOSED JURY INSTRUCTIONS

* * *

Requested Jury Instruction No. 22

(Duty to Intervene)

Plaintiffs submit that, in accordance with the authority set forth below, the following instruction is necessary to ensure that the jury understands that each Defendant need not be found to have used force against one of the Plaintiffs in order to be found liable. It is enough that they witnessed the use of excessive force and did not intervene. This is critical to

Plaintiffs' case, particularly given Plaintiffs' contention that Defendants' attacked them without provocation in the middle of the night. Plaintiffs further believe that, under the circumstances of this case, Defendants should be held joint and severally liable. Finally, Plaintiffs believe that a fair reading of the Fourth Amended Complaint makes clear that Plaintiffs' alleged other officers were present for each instance in which excessive force was utilized, and that the duty to intervene is inherent to section 1983 claims, which were specifically plead. See Fourth Am. Cmplt. at ¶¶ 31, 43, 44.

Defendants' object to the charge on the ground that this allegation was not specifically plead in the Complaint and did not give notice to Defendants. Each allegation in the Complaint alleges physical contact by certain defendants and not any allegations that other officers witnessed any unlawful conduct. Each defendant is said to have either "kicked," "pushed," "struck," or "threw" plaintiffs. There is no mention that the defendants observed unlawful conduct or were in a position to intervene. Defendants object to the claim that they should be held jointly and severally liable as each defendant has to have been found to have personal involvement in order to be liable to plaintiffs.*

In order to hold a defendant liable for the use of excessive force pursuant to section 1983, the Plaintiffs need not demonstrate that the Defendants actively participated in using force against the plaintiff. Instead, if a Defendant was present and failed to

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* Defendants will submit a proposed jury instruction regarding the duty to intervene if the Court determines that this is a viable claim.

intervene to prevent other Defendants from infringing on the constitutional rights of plaintiff, he is liable under section 1983 if you find that he:

(1) Had reason to know that excessive force was being used;

and

(2) Had a realistic opportunity to intervene to prevent the harm from occurring.

Authority: *Anderson v. Branen*, 17 F.3d 552, 557-58 (2d Cir. 1994) (ordering new trial on basis of trial court's refusal to issue a jury charge on the duty to intervene); *O'Neill v. Krzeminski*, 839 F.2d 9, 11 (2d Cir.1988); *Byrd v. Clark*, 783 F.2d 1002, 1007 (11th Cir.1986); *Webb v. Hiykel*, 713 F.2d 405, 408 (8th Cir.1983); *Bruner v. Dunaway*, 684 F.2d 422, 426 (6th Cir.1982), cert. denied, 459 U.S. 1171, 103 S.Ct. 816, 74 L.Ed.2d 1014 (1983); *Byrd v. Brishke*, 466 F.2d 6, 11 (7th Cir.1972)*Yang v. Hardin*, 37 F.3d 282 (7th Cir. 1994).

APPENDIX G

[Stipulation (May 26, 2009)]

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF NEW YORK

SEAN STEPHEN AND DARYL STEPHEN,
Plaintiffs,

v.

POLICE OFFICER JOHN HANLEY, SHIELD NO. 13166, POLICE OFFICER EDGAR BOURDON, SHIELD NO. 30988, SERGEANT JUAN WHITE, POLICE OFFICER MICHAEL ILIADIS, POLICE OFFICER TERRANCE BRILL, POLICE OFFICER PATRICK COLEMAN, POLICE OFFICER DEREK DUNSTON, POLICE OFFICER RICHARD MILLER AND DETECTIVE JOSE HERNANDEZ,
Defendants.

No. 03-CV-6226 (KAM)

STIPULATION

IT IS HEREBY STIPULATED AND AGREED, by and between Plaintiffs, Sean and Daryl Stephen, and Defendants P.O. John Hanley, P.O. Edgar Bourdon, Sergeant Juan White, P.O. Michael Iliadis, P.O. Terrance Brill, P.O. Patrick Coleman, P.O. Derek Dunston, P.O. Richard Miller and Detective Jose Hernandez, by their respective undersigned counsel, as follows:

On July 10, 2002, Defendants Juan White, Michael Iliadis, Terrance Brill, Patrick Coleman, Derek Dunston, Richard Miller, and Jose Hernandez (collectively, the "ESU Team") were present in apartment 2L at 1316 Sterling Place during the execution of a search warrant. Defendants John Hanley and

Edgar Bourdon entered apartment 2L at 1316 Sterling Place sometime after the ESU Team secured Sean and Daryl Stephen.

Dated: New York, New York

May 26, 2009

NEW YORK CITY LAW DEPARTMENT

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Attorneys for Plaintiffs

APPENDIX H

[Complaint in *Campbell v. Lynch* (N.D. Ga.) (May 24, 2006)]

IN THE UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA,
ROME DIVISION

WILLIE MAE CAMPBELL,
Plaintiff,

v.

MICHAEL LYNCH AND DUSTIN CLAY,
Defendant.

Civil Action File No. 4:06-CV-114-HLM

COMPLAINT

The Plaintiff, WILLIE MAE CAMPBELL, by her attorney, BOBBY LEE COOK, complaining of the Defendant herein alleges as follows:

FIRST CAUSE OF ACTION

1. This action arises under the Fourth and Fourteenth Amendments to the United States Constitution under Title 42 USC § 1983.

2. This Court has jurisdiction of this action pursuant to Title 42 USC § 1983.

3. At all times hereinafter mentioned, the Plaintiff was and still is a citizen of the United States of America residing in Cedartown, Polk County, Georgia.

4. At all times hereinafter mentioned, Defendants Michael Lynch and Dustin Clay were and still are employed by the Polk County, Georgia, Police

Department as police officers. Both Defendants are residents of Polk County, Georgia.

5. At all times hereinafter mentioned, each and all of the acts of the Defendants alleged herein were done by the Defendants under the color and pretence of the statutes, regulations, customs and usages of the State of Georgia and under the authority of their office as heretofore alleged in the Police Department of the County of Polk, State of Georgia.

6. At all times relevant, the Plaintiff was located in her private dwelling in Cedartown, Georgia, and was not violating any law of the State or Municipal ordinance of the Municipality of Cedartown.

7. At all times relevant, the Plaintiff had not consented to allowing or permitting said Defendants to enter her dwelling, and no exigent circumstances or lawful authority existed that would authorize their entry.

8. On or about December 7, 2005, the Defendants demanded entry to Plaintiff's dwelling and physically broke open the door without the Plaintiff's consent and over Plaintiff's protest.

9. At the above mentioned date, time and place and upon entering said premises, the Defendants seized Plaintiff and handcuffed her, twisting and jerking her left arm in such a manner that resulted in serious and permanent injuries thus causing her to be hospitalized.

10. As a result of the violent and unlawful acts of the Defendants, Plaintiff has incurred hospital and doctor bills in excess of $25,000.00, and has suffered permanent injuries and extreme pain and suffering.

11. The aforesaid acts were done by the Defendants with the purpose and intent of depriving Plaintiff of her right to be free from unreasonable seizure secured to her under the Fourth Amendment to the United States Constitution and of her right not to be deprived of liberty without due process of law in violation of the Fourteenth Amendment to the United States Constitution.

12. That solely as a result of the unlawful acts of the Defendants herein, Plaintiff sustained serious personal injuries and has suffered great mental anguish.

13. That solely as a result of the Defendant's actions, Plaintiff has sustained damages in the sum of $500,000.00.

SECOND CAUSE OF ACTION

14. That the Plaintiff represents and reiterates each and every allegation in Paragraphs 1-13 of the Complaint as if more fully set forth herein.

15. The acts, conducts and behavior of the Defendants were performed knowingly, intentionally and maliciously, by reason of which the Plaintiff is entitled to punitive damages in the sum of $1,000,000.00.

WHEREFORE, Plaintiff demands Judgment against the Defendants herein in the sum of $500,000.00 in the first cause of action and $1,000,000.00 in the second cause of action, together with the costs of this action and attorneys' fees and such other and further relief as may be just and mete.

Plaintiff demands a trial by jury.

This 22 day of May, 2006.

respectfully submitted,

BOBBY LEE COOK
Georgia Bar No. 183100
Attorney for Plaintiff

COOK & CONNELLY
P. 0. Box 370
Summerville, GA 30747
(706) 857-3421¶

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No. 10-220

Supreme Court, U.S.
FILED
NOV 1 - 2010
OFFICE OF THE CLERK

IN THE
SUPREME COURT OF THE UNITED STATES

SEAN STEPHEN AND DARYL STEPHEN,

Petitioners,

-v.-

P.O. JOHN HANLEY, SHIELD NO. 13199, P.O. EDGAR BOURDON, SHIELD NO. 30988, SGT. JUAN WHITE, P.O. MICHAEL ILIADIS, P.O. TERRANCE BRILL, P.O. PATRICK COLEMAN, P.O. DEREK DUNSTON, P.O. RICHARD MILLER, AND DET. JOSE HERNANDEZ,

Respondents.

==========

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

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LEONARD J. KOERNER,*
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of Counsel.
*Counsel of Record

QUESTION PRESENTED

Did the Circuit Court of Appeals correctly affirm the District Court's refusal to give a "duty to intervene" jury instruction as a proper exercise of its discretion, where respondents would have been unfairly prejudiced by the introduction at trial of a new theory of liability of which respondents had not been given notice?

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No. 10-220

IN THE SUPREME COURT OF THE UNITED STATES

SEAN STEPHEN and DARYL STEPHEN,

Petitioners,

-v.-

P.O. OFFICER JOHN HANLEY, Shield No. 13199, P.O. EDGAR BOURDON, Shield No. 30988, SGT. JUAN WHITE, P.O. MICHAEL ILIADIS, P.O. TERRANCE BRILL, P.O. PATRICK COLEMAN, P.O. DEREK DUNSTON, P.O. RICHARD MILLER, and DET. JOSE HERNANDEZ,

Respondents.

==========

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SECOND CIRCUIT

BRIEF IN OPPOSITION

STATEMENT OF FACTS

Petitioners Sean Stephen and his teenage son Daryl Stephen (collectively "petitioners") commenced this civil rights action under 42 U.S.C. § 1983 against respondents, John Hanley, Edgar Bourdon, Juan White, Michael Illiadis, Terrence

Brill, Patrick Coleman, Derek Dunston, Richard Miller and Jose Hernandez, police officers employed by the New York City Police Department (A104-A111).[1] In their fourth amended complaint (the "Complaint"),[2] petitioners claimed that respondents violated their rights under the Fourth and Fourteenth Amendments of the United States Constitution by using excessive force against them during the execution of a search warrant and subsequent arrest of Sean Stephen.

After having filed five complaints and completed discovery on petitioners' sole claims of excessive force against respondents, petitioners sought, on April 7, 2009, to include a claim for failure to intervene into the case as Requested Jury Instruction Number 22 in their Proposed Jury Instructions (A235-A236; Appendix F). In the amended complaint, petitioners, then pro se, alleged that Miller and Dunston observed petitioners being subjected to force (A86). Petitioners subsequently deleted those allegations in the (fourth amended) Complaint prepared by counsel.

At a pre-trial conference held on May 27, 2009 (A264-A302), the District Court observed that "there is nothing [in the fourth amended complaint] that hints about such a claim" for failure to intervene (A281). Petitioners argued that the claim

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[1] "A ___" citations refer to the Joint Appendix filed in the Second Circuit.

[2] Petitioners commenced this action pro se (A42-A53), but were represented by counsel at the time of the filing of the fourth amended complaint (A104-A111).

could be inferred from allegations that the officers were present at the scene,[3] and that they were on notice of the claim from the pleadings and deposition testimony (A281). Respondents countered that the Complaint failed to put them on notice of such a claim where there were no allegations that any of the respondents witnessed, or were even in a position to witness, the use of excessive force by any other respondent (A384-A385); and that respondents would be prejudiced if this new theory of liability were introduced into the case at such a late juncture (A384-A385).

On June 1, 2009, the District Court denied petitioners' request for a failure to intervene charge because it had not been pled adequately, either in the (fourth amended) Complaint or in any prior pleading (A510; Appendix B). The District Court stated that "the courts require that a failure to intervene claim must be pled with sufficient particularity by naming which defendants are allegedly liable for failure to intervene with respect to each particular incident" (A510-A511; Appendix B).

At the charging conference on June 5, 2009, the District Court declined to permit the inclusion of a failure to intervene claim in the case (A1667; Appendix D). The court observed that respondents

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[3] According to a stipulation, dated May 26, 2009, it was agreed that respondents White, Iliadis, Brill, Coleman, Dunston, Miller, and Hernandez (the "ESU team") were present in the apartment during the execution of a search warrant on July 10, 2002; and respondents Hanley and Bourdon entered the apartment after the ESU team had secured petitioners (A262-A263, Appendix G).

had objected since first being put on notice in April 2009 via the proposed jury instruction that petitioners sought to proceed under that theory (A1660; Appendix D). The trial court also observed that the Second Circuit had not yet decided whether a claim for failure to intervene must be pled as a separate cause of action (A1660; Appendix D). Moreover, in this case, there was "a total absence of any appropriate notice" in the complaint, which had been prepared with benefit of counsel, and the lengthy delay would unfairly prejudice respondents (A1661; Appendix D). Finally, the District Court found it significant that petitioners never sought to amend their pleadings to include this claim (A1661-A1662; Appendix D).

After hearing further argument on the issue (A1662-A1666; Appendix D), the District Court stated as follows (A1667; Appendix D at 28a-29a):

I mean, if anything, the prior complaint that you rely on, the March 17, 2004 complaint, in which the plaintiffs point out that they alleged that Defendant Miller saw excessive force and Defendant Dunston watched excessive force being used against the plaintiffs, that may have been adequate, but it was superseded by the fourth amended complaint, and that was dropped out. So, if anything, it had the effect of putting [defendants] on notice that they weren't going to be facing exposure or failure of their duty to intervene. If anything it would have lulled the defendant into thinking: All right. Well, that's not a theory under which we face exposure. And again, you know, for me to try to -- it's prejudicial, I have no doubt, and I do believe that the opening statement could have been different. Had they known, I believe, the

witnesses that they might have called would have been different. Indeed, their summations, which are going to be given today, are probably going to be different based on that. So I really have to say, counsel -- that it's just too late in the game.

Following a week-long trial, the jury returned a verdict for the respondents, except with respect to an award of nominal damages in the amount of $1.00 to petitioner Daryl Stephen on his claim against respondent Brill. The jury declined to award punitive damages. The District Court entered judgment on June 15, 2009 (A1953).

Petitioners filed a Notice of Appeal on July 8, 2009 (A1954-A1955). They sought a new trial, claiming that the District Court erroneously failed to instruct the jury on the affirmative duty of law enforcement officers to intervene to prevent violations of constitutional rights by other law enforcement officers in their presence. Petitioners further claimed that the District Court compounded its error by incorrectly instructing the jury that it must consider petitioners' excessive force claims independently against each individual respondent.

The Court of Appeals for the Second Circuit affirmed, stating (Appendix A at 3a),

We see the issue not as whether a police officer has a duty to intervene, but whether the district court abused its discretion in declining to permit plaintiffs to introduce a new theory of liability at trial. Plaintiffs' fourth amended complaint did not give defendants notice that plaintiffs intended to pursue a 'duty to intervene'

theory of liability, and thus, plaintiffs' proposed jury instruction would have introduced a new claim to the case. In essence, plaintiffs were seeking leave to amend their complaint as trial was about to commence.

In the view of the Circuit Court, petitioners were, in essence, seeking leave to amend their complaint as trial was about to commence (Appendix A at 3a), and the decision by the trial judge to deny petitioners leave to introduce a new theory of liability at that late juncture did not amount to an abuse of discretion. See ATSI Commc'ns, Inc. v. Shaar Fund, Ltd., 493 F.3d 87 (2nd Cir. 2007) (denial of leave to amend reviewed for abuse of discretion).

The Circuit Court went on to observe that, although petitioners maintained that a "duty to intervene" charge was essential to their ability to recover from respondents where it was "impossible" for them to identify their specific attackers, the (fourth amended) Complaint did not proceed on that theory (Appendix A at 3a-4a). To the contrary, the Complaint specifically ascribed particular allegations to individual officers (Appendix A at 4a):

Defendant Iliadis struck plaintiff Sean Stephen with a baton

Defendant Hayden struck plaintiff Sean Stephen in his jaw with a closed fist

Defendant Miller tightly handcuffed Sean Stephen . . . and deliberately pushed him into a wall.

Significantly, the Complaint did not allege any difficulty in determining each officer's role or give notice to respondents that petitioners would be proceeding under a 'duty to intervene' theory of liability (Appendix A at 4a).

Lastly, the Circuit Court of Appeals noted that the issue of including the proposed "duty to intervene" charge in the jury instructions was not brought to the District Court's attention until the final pre-trial conference, only days before the trial was set to begin (Appendix A at 4a). In the Court's view, it was well within the trial judge's discretion not to permit petitioners to introduce a new theory of liability at that point on the ground that respondents would be prejudiced by such a late amendment (Appendix A at 4a).

REASONS FOR DENYING THE WRIT

I. Petitioners' Fact-Based Claim Does Not Warrant This Court's Review.

The question raised by petitioners mischaracterizes the decision below and does not present any "compelling reasons" for granting the petition. See Sup. Ct. R. 10. Indeed, the District Court and the Second Circuit properly determined that respondents would have been unfairly prejudiced if petitioners were permitted to introduce a new theory of liability into the case, which they had previously abandoned in favor of a different theory prior to the commencement of discovery, on the eve of trial. Petitioners' challenge to the holdings of the Courts below, that respondents had notice of a legal theory that was not pled, is based on their particular interpretation

of the facts of this case. The decisions below explained why that interpretation does not undercut the District Court's proper exercise of discretion to refuse to allow the claim to be introduced, and the Courts' resolution of that issue does not warrant review by this Court.

Petitioners assert that "in this case, the Court of Appeals for the Second Circuit affirmed the District Court's holding that claims for the failure to prevent excessive force must be pleaded separately from claims for excessive force" (Petition at p. 6). Petitioners further assert that this holding, while consistent with the First and Sixth Circuits, is inconsistent with decisions by other circuit courts, including the Seventh and Eleventh Circuits, which do not require that claims against law enforcement officers pursuant to 42 U.S.C. 1983 for the failure to prevent the use of excessive force be pled separately from excessive force claims arising under the same statute.

However, petitioners mischaracterize the holding of the Second Circuit with respect to the duty to intervene. In fact, the Circuit Court affirmed the District Court's refusal to charge the jury on a "duty to intervene" theory as a proper exercise of its discretion. The Circuit Court, like the District Court, expressed concern that respondents had not been given notice that petitioners sought to proceed under that theory and, in fact, petitioners had not proceeded under that theory in the District Court. To the contrary, the Complaint ascribed specific usages of excessive force to individual officers. These allegations in the Complaint are inconsistent with the new theory that petitioners' sought to advance on the eve of trial – that

petitioners were unable to identify the specific officers who assaulted them and therefore had to rely upon law enforcement officers' "duty to intervene" in order to attach liability to the officers who were present in the apartment for the execution of the search warrant.

The District Court correctly refused to allow petitioners to include a claim, which had not been pled or tested in discovery, because respondents would have been unfairly prejudiced. Although an earlier version of the complaint alleged that two of the respondents observed the use of excessive force on plaintiffs, none of the superseding amendments to the complaint, including the final amendment prepared by counsel, contained this allegation (A89-A94, A104-A111). The District Court properly noted that the omission of the claim from subsequent pleadings likely lulled respondents into believing that petitioners had abandoned that theory of liability, and consequently, the omission would have caused respondents to not conduct discovery to defend against it.

Based upon the foregoing, this petition does not merit this Court's attention.

II. Petitioners Have Not Shown a Conflict in the Case Law or Identified an Important Federal Question to Support Their Petition for Certiorari.

Petitioners' petition fails to establish a conflict among the Circuit Courts of Appeals, or a conflict with this Court's prior cases, so as to justify their petition for certiorari.

It is well-settled that a complaint must give defendants "fair notice" of the claim and the ground upon which the claim rests. Fed. R. Civ. Proc., Rule 8; Swierkiewicz v. Sorema, 534 U.S. 506, 512 (2002); Conley v. Gibson, 355 U.S. 41, 47 (1957); Ashcroft v. Iqbal, 2009 U.S. LEXIS 3472, at *28-29, *44, No. 07-1015 (U.S. May 18, 2009) (dismissing a complaint for failure to state a claim as the Federal Rules of Civil Procedures "demands more than an unadorned, the-defendant-unlawfully-harmed-me accusation" and where the complaint merely "tenders naked assertions devoid of further factual enhancement") (internal quotations and citations omitted).

Petitioners theorized that officers are necessarily liable for failure to intervene by their mere presence in a location where excessive force was allegedly used, even if the officers were unaware that excessive force had been used and thus had no opportunity to intervene (App. Br. at pp. 21, 29-30). However, as we argued in the Circuit Court of Appeals, this theory impermissibly relieved petitioners of the obligation to attach liability to a defendant based upon particularized allegations against him. More importantly, however, these claims were never pled.

In fact, the Complaint alleged only generalized claims for excessive force against the individually named officers. There was no allegation that any of the officers observed, or were even in a position to observe, any excessive force committed against petitioners.[4] Nor did petitioners

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[4] See Fanelli v Town of Harrison, 46 F Supp 2d 254, 258 (S D N Y 1999) (observing that, if the plaintiff had alleged

provide any context in terms of where in the apartment or at what point each purported act of excessive force occurred.

Petitioners argue that there is no requirement that a claim for failure to intervene be pled separately when excessive force has been alleged; however, they acknowledge that this Court has never held that claims for duty to intervene are subsumed by claims for excessive force. Here, the Complaint utterly failed to give respondents notice of a claim for failure to intervene, and petitioners never sought to amend their complaint to include this claim. In fact, the District Court correctly remarked that petitioners' amendment of the complaint, removing what arguably could be broadly construed as a failure to intervene claim, in fact, had the effect of putting respondents on notice that they were not going to be facing exposure for failure to intervene (A1667). Where respondents did not receive notice of the claim, there was no basis to charge the jury on that claim.

The mere fact that the respondent officers were present in the apartment is insufficient to establish that the officers were aware of any alleged instances of use of excessive force and failed to avail themselves of the opportunity to intervene. This is especially true given the fact that the

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facts tending to show that a responding officer had observed an altercation between an off-duty officer and plaintiff and was thus in a position to know that there was no basis for the off-duty officer to effectuate the arrest, then plaintiff might be able to make out a claim that the responding officer violated the duty of every police officer to intervene when he sees civil rights being violated)

respondents were present in connection with the execution of a search warrant, and were inside different rooms of the apartment at different times in furtherance of that purpose.

Petitioners were represented by counsel when they filed their (fourth amended) Complaint (A282). Because petitioners were not entitled to the liberal pleading standard which is afforded to unrepresented parties, there was no basis upon which to allow them to assert for the first time, on the eve of trial, a claim for failure to intervene. There were no allegations in the Complaint that would have put respondents on notice that a failure to intervene theory of liability would be pursued.

Furthermore, there is a vast weight of authority in other circuits establishing the impropriety of raising failure to intervene for the first time in opposition to a summary judgment motion. See Calvi v. Knox County, 470 F.3d 422 (1st Cir. 2006); Harper v. Albert, 400 F.3d 1052 (7th Cir. 2005); Thornton v. Spooner, 872 F.2d 1029 (6th Cir. 1989). Accordingly, where other appellate courts have denied the attempt to raise such a claim at the summary judgment stage, petitioners' attempt here to raise the claim on the eve of trial in a proposed jury instruction was even less compelling.

Finally, as the Courts below recognized to allow petitioners to proceed otherwise would have severely prejudiced respondents. Contrary to petitioners' claim, respondents were not on notice of this purported claim and no discovery was conducted on this issue. This was significant because a failure to intervene claim has its own

elements, separate and apart from a claim for excessive force.[5]

With the numerous respondents in this action, had petitioners pled a failure to intervene cause of action, discovery would have been necessary regarding the aforementioned elements. On the eve of trial, there was no opportunity to conduct further discovery, and respondents would have been severely and unfairly prejudiced by that lost opportunity. At the charging conference, the District Court properly refused to allow the claim to be included in the case because respondents were not put on notice of that theory of liability until after the close of discovery, and there was no explanation for petitioners' failure to seek leave to amend their complaint to plead this claim (A1661-A1662).

The jury instruction in this case was properly based upon the claims pled and tested in discovery -- excessive force against all respondents. Because respondents were not given notice that petitioners intended to pursue a theory of liability under a duty to intervene, there was no basis upon which to charge the jury to consider that claim. As a result, the District Court properly instructed the

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[5] In an excessive force claim, a jury need only consider whether the officers acted reasonably in light of the facts and circumstances of the situation they faced, without regard to their underlying motives or subjective intent toward the suspect. See Graham v. Connor, 490 U.S. 386, 397 (1989). Some of the factors to be considered are whether the suspect posed an immediate threat to the safety of the officers or others, and whether the suspect was actively resisting arrest or attempting to evade arrest by flight. See id.; Sullivan v. Gagnier, 225 F.3d 161, 165 (2nd Cir. 2000). These are not the elements of a failure to intervene claim.

jurors to consider "the element at issue as to each defendant by a preponderance of the evidence" (A1868).

Petitioners' theory on appeal, that claims for failure to intervene are encompassed by claims for excessive force and need not be separately pled, is without merit and was not warranted based on decisions from other federal appellate courts.

Miller v. Smith, 220 F.3d 491 (7th Cir. 2000), actually undercuts plaintiffs' argument. In Miller, plaintiff had sued all six officers that eventually arrived on the scene of an alleged assault. Id. at 493. All claims against the three officers who arrived at the scene too late to have been involved in the alleged use of excessive force were dismissed, and later, plaintiff withdrew claims against a fourth officer, leaving only two officers in the action. Id. Based on the summary judgment context and viewing the evidence in the light most favorable to the plaintiff, the court found that plaintiff had presented a viable claim where he alleged that, while he was lying face down on the ground, one of the two remaining defendant officers beat him while the other officer stood idly by. Id. at 491.

In this case, like Miller, some of the named respondent officers arrived on the scene after petitioners had already been secured. Neither petitioner distinguished them from the officers comprising the ESU team who were the first to enter the apartment and were responsible for securing the occupants of the apartment (A262-A263). Further, petitioners' challenge to a jury instruction does not entitle them to the same

favorable standard that a non-movant would be given in the summary judgment context, particularly when the challenge involves a claim that was not pled, tested in discovery, or supported by the evidence.

Petitioners' reliance on Richman v. Sheahan, 512 F.3d 876 (7th Cir. 2008), another Seventh Circuit case, is equally unpersuasive. In Richman, a grossly obese man became irate in a courtroom and clung to the podium, refusing to leave. Id. at 880. After the judge pressed a panic button, a swarm of deputies dragged the man away from the podium, and several of them sat on his back as he continued to struggle while laying face down on the floor. Id. The man was eventually handcuffed, after which the deputies saw that he was dead. Id. There, the appellate court reversed the grant of summary judgment, observing that "with regard to those deputies who just stood around looking while (the decedent) was being swarmed, [i]f they should have realized that their colleagues were using excessive force they had a duty to intervene, for they were part of the arresting force, awaiting a call to join the swarm should it become necessary." Id. at 885. Unlike Richman, the evidence adduced in this case did not support a claim that any of the officers should have realized that fellow officers were using excessive force against the petitioners. Indeed, in this case, petitioners made only generalized allegations of excessive force against officers whose names were included in the warrant paperwork.

Nor does Hale v. Townley, 45 F.3d 914, 919 (5th Cir. 1995), relied upon by petitioners, compel a different result. In that case, the Fifth Circuit

affirmed the denial of motions for summary judgment against three officers under section 1983 where a genuine issue of material fact existed as to whether the officers were present at the scene and failed to take reasonable steps to protect a suspect from another officer's use of excessive force. The plaintiff in Hale alleged, inter alia, that Officer Fant stood by and laughed as Officer Fox slammed plaintiff against the car; rammed his fist into plaintiff's testicles, and repeatedly tried to slam plaintiff's head into the car; and that officers Stroud and Fant yelled encouragement at Officer Fox. Those facts are very different from the facts here, where petitioners alleged excessive force against officers based solely on their presence at the execution of a search warrant, without any specifics whatsoever about what a particular respondent did or did not do.

Finally, Campbell v. Lynch, 264 Fed. Appx. 836; 2008 U.S. App. LEXIS 2928 (11th Cir. 2008), is unavailing. In that case, after two officers responded to a report of domestic violence and neutralized the situation, they arrested the subject of the report and instructed the plaintiff caller to go inside her home. Because there was no justification for the officers to enter plaintiff's home and detain her, a reasonable juror could find that force was unnecessary where she had committed no crime and posed no danger to herself or others, and the other officer failed to take reasonable steps to protect her. This case is distinguishable because there was no challenge to the lawfulness of the officers' presence in the apartment, and there was no evidence to support any officers' awareness of a fellow officer's unlawful use of force against petitioners.

None of these cases are analogous to the facts presented in the case at bar. Accordingly, the Stephens' petition cannot be based on a conflict in the Circuits Courts of Appeal.

For all the reasons stated, the Second Circuit properly affirmed the District Court's refusal to permit petitioners' to introduce a new theory of liability on the eve of trial as a proper exercise of its discretion. This case does not raise any issues warranting further review by this Court.

CONCLUSION

FOR THE REASONS STATED, THE PETITION FOR A WRIT OF CERTIORARI SHOULD BE DENIED.

Dated: New York, New York
November 1, 2010

Respectfully submitted,

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No. 10-220

In the Supreme Court of the United States

SEAN STEPHEN AND DARYL STEPHEN,
Petitioners,

v.

POLICE OFFICER JOHN HANLEY,
SHIELD NO. 13199, ET AL.,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

PETITIONERS' REPLY

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ARGUMENT

Defendants rely heavily on the notion that they did not learn of the failure-to-intervene theory until the "eve of trial." Opp. 7. That assumes exactly the issue raised in the Petition—whether a pleading of excessive force, which defendants received long before the trial, necessarily encompasses, and thereby gives notice of, a claim for failure to intervene.

Nor is plaintiffs' characterization even factually accurate. Despite their carefully-worded assertion that the issue "was not brought to the District Court's attention until . . . days before the trial" (Opp. 7), they do not dispute, that ***they*** had notice "some eight weeks before trial" (App., 4a). Discovery also gave defendants ample notice that the plaintiffs intended to pursue the theory. In his deposition, Sean Stephen explained that he was suing Sergeant White because he "was in the household. White was there while they was beating me and ***he didn't do anything to stop them from doing anything***." Second Circuit App. at 326 (emphasis added). The Fourth Amended Complaint likewise alleged that Sergeant White was liable for supervising other defendants. App., 32a (alleging that other defendants "were acting under the command of defendant WHITE").

It is also telling that, in all their protests about unfair surprise, defendants never identify anything that they would have done differently had they had notice of the failure-to-intervene claim—not even a single deposition question. That is no accident. It is hard to imagine discovery on an claim for use of excessive force that fails to address the only two issues relevant to failure to intervene, namely, whether any

officers did intervene and, if not, whether they had the opportunity to do so. And, as explained in the Petition (at 9–10) any prejudice is particularly small given the testimony in this case.

Defendants also rely on the Second Circuit's assertion that the denial of the instruction was within the District Court's "discretion." That misstates the standard of review. In the Second Circuit:

> A litigant is entitled to an instruction on a claim where that claim is supported by evidence of probative value. All that a party needs to show is that there is some evidence supporting the theory behind the instruction so that a question of fact may be presented to the jury. The failure to give an instruction under such circumstances is error that warrants a new trial if that error is prejudicial.

Anderson v. *Branen*, 17 F.3d 552, 557 (2d Cir. 1994). The District Court rejected the proffered instruction because it decided that excessive force and failure to intervene are distinct claims. That, we submit, was a decision of law.

Defendants attempt to distinguish *Miller* v. *Smith*, 220 F.3d 491 (7th Cir. 2000) and *Richman* v. *Sheahan*, 512 F.3d 876 (7th Cir. 2008) only on the evidence. Opp. 14–15. They ignore the relevant point, which is that *Miller* allowed a failure-to-intervene theory to proceed even though it was not distinctly pleaded. (Plaintiffs rely on *Richman* only for the proposition that failure to intervene is a subset of excessive force. See Pet. 8.) Significantly, in denying the instruction, the District Court here did not find that there was not "some evidence [that]

support[ed] the theory"; it relied solely on the absence of an express pleading.

As to *Miller*, defendants argue only that "some of the named respondent officers arrived on the scene after petitioners" were "secured." Opp. at 14. Even assuming that the jury would have accepted that version of the facts, defendants do not even argue that it would have applied to the other officers, who admitted being in the apartment while the beatings occurred. Likewise, the fact that, here, "the Complaint ascribed specific usages of excessive force to individual officers" (*id.* at 8) hardly put the defendants less on notice of failure-to-intervene liability than they were in *Miller*. Nor are allegations that each officer actually used force "inconsistent" (*ibid.*) with the theory that those same officers were present and failed to stop the use of force by others.

Defendants distinguish *Hale* v. *Townley*, 45 F.3d 914 (5th Cir. 1995), on the ground that the *Hale* plaintiff alleged that some defendants "stood by and laughed" (*id.* at 917), while the Petitioners did not plead "specifics" about what the non-intervening officers did. Opp. 16. Not only does *Hale* not specify whether those allegations were in the complaint or merely in the factual record, plaintiffs never explain why they are relevant—section 1983 does not impose heightened pleading standards. In this case, plaintiffs alleged that they were beaten in the dark, and it should be no surprise that they did not notice whether the other officers were laughing.

Finally, defendants' treatment of *Campbell* v. *Lynch*, 264 F. App'x 836 (11th Cir. 2008) is irrelevant. They argue that the plaintiff in *Campbell* had challenged the legality of the officers' entry, while the plaintiffs here did not. Opp. 16. But the legality

of the arrest neither permits the officers to use excessive force themselves nor obviates their duty to prevent the use of force by others. Here, as stated above, the jury could have inferred that no one in the small apartment could have been unaware of the beatings going on in the bedroom.

CONCLUSION

The petition for a writ of certiorari should be granted.

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